Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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(3)

No. 89-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF DETROIT,

Petitioner,

v.

THE COUNTY OF OAKLAND AND
THE COUNTY OF MACOMB,

Respondents.

PETITION OF THE CITY OF DETROIT FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER CITY OF DETROIT'S RESPONSE TO RESPONDENTS' BRIEFS IN OPPOSITION

BELL AND GARDNER, P.C.
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16 pp

QUESTIONS PRESENTED

I. WHETHER PETITIONER'S SERVICE BY MAIL AT RESPONDENT'S COUNSEL'S CURRENT ADDRESS WAS PROPER.

II. WHETHER THE RESPONDENTS HAVE SUSTAINED AN INJURY WHEN THEY ARE NOT REQUIRED TO CONTRIBUTE ANY MONEY TO THE FUNDS IF MUNICIPALITIES AND END USERS DO NOT PAY THEIR BILL.

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I. PETITIONER PROPERLY SERVED RESPONDENT OAKLAND

In response to Respondent Oakland County's Memorandum Requesting Denial of Petitioner's Petition for Writ of Certiorari, Petitioner City of Detroit states to this Court that on July 14, 1989, it properly served by mail, three (3) copies of its Petition in the above matter on Mr. Phillip G. Tannian, Counsel for Oakland County, at 243 West Congress Street, Suite 390, Detroit, Michigan 48226. (See Exhibit A). On that same date, Petitioner also properly served by mail, three (3) copies of its Petition on William W. Misterovich, Counsel for Macomb County, S. Allen Early III, Counsel for Mayor Coleman A. Young on a related Petition and Richard E. Zuckerman, Counsel for Nancy Allevato and others on a

related Petition. Messers. Misterovich, Early and Zuckerman received the Petitions sent to them. On August 4, 1989 Petitioners also served, by mail, a copy of their Notice of docketing of Petition for Certiorari and Appearance forms on Mr. Tannian and Mr. Misterovich.

On August 7, 1989, Counsel for Petitioner received a call from the offices of Mr. James Rubin, Co--Counsel for Oakland County, indicating that they wanted a copy of the Petition and one was mailed to them. (See Exhibit B). On August 8, 1989, Petitioner's Counsel, Cynthia K. Yott, spoke with someone from Mr. Rubin's Office who indicated that they wanted another copy of the Petition express-mailed to their office in Chicago. When Ms. Yott indicated that Respondent's copies ot the Petition had been previously served on Mr. Tannian, she was then informed that Mr. Tannian alleged that he had not received any Petitions. A copy of the Petition was express-mailed to Mr. Rubin's office on that day. (See Exhibit C).

On that same day, Ms. Yott telephoned Mr. Tannian to see if he had received the Petitions and he alleged that he had not. She then immediately verified Mr. Tannian's current address and that three (3) copies of the Petition had indeed been mailed to him on July 14, 1989. She had another copy hand-delivered to his office that day. (See Exhibit C). It is interesting to note that at no time did Counsel for Petitioner receive a call from Mr. Tannian's office indicating that he had not received copies of the Petition even after his co-counsel knew that a Petition had been filed by Detroit. Mr. Tannian was the lead and local counsel in the case before the lower courts.

Service by U.S. Mail is proper and allowable under the Rules of the U.S. Supreme Court. Petitioner has clearly complied with all of the applicable rules when it mailed three (3) copies of the petition to Mr. Tannian's current address. The Court should be aware that at no time has Petitioner attempted to "protract" any litigation in this matter, but has

merely exercised its proper rights in seeking to have the District Courts' decision in Petitioner's favor upheld.

Petitioner CITY OF DETROIT therefore requests that this Honorable Court deny Respondent's request to strike DETROIT'S Petition for Writ of Certiorari. Although Respondent Oakland did not specifically respond to the merits of Detroit's Petition for Certiorari, Detroit will respond below to the arguments presented in Respondent's Briefs regarding Mayor Coleman A. Young (89-101) and Nancy Allevato, et. al (89-56). Detroit would also adopt by reference, the responses of Young and Allevato in those cases.

II. RESPONDENTS SUSTAIN NO INJURY BECAUSE THEY ARE NOT OBLIGATED TO CONTRIBUTE TO THE FUNDS.

Respondents have not plead an injury sufficient to grant them standing under *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 342 U.S. 481 (1968). The Response Brief presented by Respondent Oakland misrepresents the facts of this case in an attempt to manufacture an injury.

Oakland's Brief insinuates that it is the County itself that is obligated to pay Detroit for sewage services used by the municipalities and end users. Oakland states "[b]y contract, the counties were obligated to purchase the services from Detroit and to pay for those services, even if they obtained no reimbursement for such services from their constituent municipalities." (p. 17).

What Oakland neglects to specifically tell this Court is that it is "obligated" only as the manager of the Funds to pay Detroit. All payment comes from the funds and only the municipalities and end users contribute to those funds. Oakland County does not contribute to the funds on behalf of the municipalities and end users. Its contracts with Detroit specifically prohibit any such contribution.

If a municipality or end user fails to pay its bill, the County will pay Detroit out of any reserve money in the

Funds. If no reserve money is available, then Detroit will be shorted. This is the position that Oakland has taken before in prior litigation. In its briefs before the Sixth Circuit in *County of Oakland v City of Berkley*, 742 F.2d 289 (6th Cir 1984), Oakland affirmatively stated that it served only as a "conduit":

> Pursuant to the system's agreement with the City of Detroit of November, 1962, the System is obligated to pay for all of the sewage it sends into the Detroit Water and Sewerage Department. Thus, if Madison Heights was held to be not obligated to pay for the portion of the storm water it sends to the City of Detroit, some other party to the contract must pick up the tab. *The Drain Commissioner has no obligation to do so under the contract. THE DRAIN COMMISSIONER HAS NO FUNDS OF HIS OWN IN THE OPERATION OF THE SYSTEM. HE IS THE CONDUIT OR MANAGING AGENT FOR THE MEMBERS OF THE SYSTEM.* Consequently, the other communities within the system would be obligated to shoulder the burden resulting from Madison Heights' exemption.

(R. 358: Joint Response, Ex. R at p. 21) (emphasis added).

Also in its Brief in *Berkley*, Oakland further contradicted its present position of being "directly injured."

> The [District] Court recognized the framework within which the Southeastern operated. *THAT FRAMEWORK, CREATED BY THE OCTOBER 1, 1962 AGREEMENT PUTS THE OAKLAND COUNTY DRAIN COMMISSIONER IN THE POSITION OF MANAGEMENT AGENT.* The Drain Commissioner is charged by the City of Detroit for sewage delivered by the District to the City of Detroit. The Drain Commissioner must collect adequate funds from the members of the District to pay the City of Detroit's charge and operate its own system. *In the event the Drain Commissioner is unable to raise sufficient funds from the members of the District to satisfy the charges of the City of Detroit, the City of Detroit suffers a loss.*

(R. 358: Joint Response, Ex. B at p. 12-13) (emphasis added).

Based upon these affirmative allegations, the Sixth Circuit held that the County was a "mere conduit" and was "an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit," *Id.* at 292. The Court in *Berkley* held that "the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewerage disposal." *Id.* 296. This ruling is not dicta, nor is it inaccurate. It reflects the actual factual situation that exists, both in the instant and in the *Berkley* case.

The Affidavit of Robert Frederick II, filed by Oakland in the instant case, confirms that Oakland itself does not contribute any funds for payments. This Affidavit admits that Oakland obtains all of the monies needed to pay Detroit from the municipalities. (Paragraph 24, page B-8 of Respondents' Brief). The funds received from the municipalities consist of the charges levied by Detroit, an additional charge for Oakland's costs and a "charge for contribution to a reserve fund". (Paragraph 16(a) (v), page B-6). Clearly, Oakland does not contribute its own money to its Funds.

Nor is Oakland legally responsible for any payment to Detroit. Oakland admits that Detroit looks to Oakland for payment only as a "practical" matter. (Paragraph 27, page B-a). In reality, Oakland is only legally obligated to pay Detroit out of the Funds. If there is not reserve money left in the Funds, Detroit will not get paid. This is legally required both by law[1] and by contract. The contracts between Oakland and Detroit specifically state:

> The aforesaid charges to be paid by the County of Oakland shall be collected by said County through sewage disposal service agreements between the County of Oakland and the several subdivisions situated wholly or partly within said Southeastern Oakland County Sewage Disposal District, it being expressly understood and

[1] MCLA § 123.745-123.747 (1967 and Supp. 1989) does not authorize the Counties to sustain a loss with the Funds.

> agreed that neither the County of Oakland at large nor its general funds, nor the funds of the County Drain Commissioner of said County other than those pertaining to said sewage disposal district, shall in any way become liable under and by virtue of this agreement.[2]

The Sixth Circuit was clearly in error when it stated that the *Berkley* ruling was incorrect since the Counties paid whether or not the municipalities paid in full or on time. (A 11 nt 5). Oakland has not attempted to correct the lower Court, but rather seeks to further present this inaccurate position to this Court.[3]

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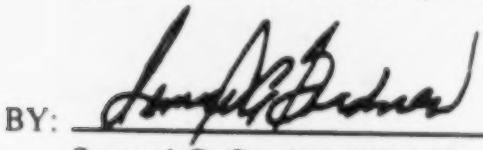
[2] This language is found in the November 23, 1942, contract between Detroit and Oakland County on behalf of the Southeastern Oakland County Sewerage Disposal District. This contract is still currently in force together with subsequent amendments and additions to other provisions. Similar if not identical language also appears in the contracts for the Evergreen/Farmington District.

[3] In its Brief on Rehearing before the Sixth Circuit, Detroit attempted to correct the Court's misunderstanding by seeking to have the contracts made part of the record. Although the contract provisions had been described and paraphrased by all parties, the actual contracts had not been placed into evidence before the lower Court. Up until the Court's January 27, 1989 ruling, it had not been necessary to do so since Oakland never denied that it collected all monies for the Fund from the municipalities and that it did not contribute any monies on their behalf. The Sixth Circuit declined to enlarge the record, stating that the contracts merely confirmed its assumption that "any and all overcharges were passed on". (A29). The contract language is offered here merely to clear up the ambiguity between Oakland's earlier assertions in *Berkley* and the Fredericks Affidavit, and those in its current response brief.

Clearly Oakland is merely a "conduit" or "managing agent" and incurs no injury to itself. Petitioner would therefore, request that this Honorable Court grant its Petition for Certiorari.

Respectfully submitted,

BELL AND GARDNER, P.C.

BY: 

Samuel C. Gardner* (P 13846)
Cynthia K. Yott* (P 33361)
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561 East Jefferson
Detroit, Michigan 48226
(313) 962-2240

(*Counsel of Record)

DATED: August 23, 1989

EXHIBITS

EXHIBIT A

LAW OFFICES
BELL AND GARDNER, P.C.

EDWARD F. BELL (1929-1988)
SAMUEL C. GARDNER
LELAND PRINCE
CYNTHIA K. YOTT
ATHINA T. SIRINGAS
GEORGE N. KOKLANARIS
CORAL M. WATT

561 EAST JEFFERSON
DETROIT, MICHIGAN 48226

962-2240
AREA CODE 313

July 14, 1989

Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Re: Petition of the City of Detroit for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Dear Court Clerk:

Enclosed herewith for filing please find forty (40) copies of the Petition of the City of Detroit for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Affidavit, and Proof of Service, by Federal Express with regard to the above-mentioned matter. Also enclosed, please find one (1) *extra* copy with a note attached to have it time stamped, a self addressed, stamped envelope for your convenience in returning it to the undersigned. (Also Includes $200.00 Check for Filing Fee).

We are forwarding all attorneys of counsel three (3) copies of our Petition in the regular U.S. Mail as requested by the Court.

Thank you for your cooperation in this matter.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg
Enclosures

cc: (w/encl.) Phillip G. Tannian, Esq.
S. Allen Early, III, Esq.
David Zacks, Esq.
William W. Misterovich, Esq.
Richard Zuckerman, Esq.

No. 89—

IN THE

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OCTOBER TERM, 1989

THE CITY OF DETROIT,

Petitioner,

v.

THE COUNTY OF OAKLAND AND
THE COUNTY OF MACOMB,

Respondents.

PROOF OF SERVICE

STATE OF MICHIGAN
COUNTY OF WAYNE } SS.:

ROSALIND A. GOLDEN, being first duly sworn, deposes and says that on the 14th day of July, 1989, she served three (3) copies each of the document entitled: Petition of the City of Detroit For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit; Affidavit; and Proof of Service upon Respondents' Attorney, and all other opposing counsel, by regular U.S. Mail and placed said documents in a well-sealed envelope with postage fully prepaid thereon and correctly addressed to:

LIST OF COUNSEL OF RECORD

Phillip G. Tannian, Esq.
Phillip G. Tannian, P.C.
243 West Congress Street
Suite 390
Detroit, Michigan 48226

S. Allen Early, III, Esq.
Miller, Cranfield, Paddock and Stone
150 West Jefferson
Suite 2500
Detroit, Michigan 48226

David Zacks, Esq.
Robert S. Harrison & Associates
6735 Telegraph Road
Suite 350
Birmingham, Michigan 48010

William W. Misterovich, Esq.
Macomb County Public Works
115 S. Groesbeck
P.O. Box 806
Mt. Clemons, Michigan 48043

Richard Zuckerman, Esq.
Howard B. Iwrey, Esq.
Honigman, Miller, Schwartz & Cohn
2290 First National Building
Detroit, Michigan 48243

and placed in a U.S. Mail Receptable located in Detroit, Michigan.

_____

ROSALIND A. GOLDEN

Subscribed and sworn to before me
this 14th day of July, 1989.

_____

LESLIE A. TARVER, Notary Public
Wayne County, Michigan
My Commission Expires: 12/10/89

EXHIBIT B

LAW OFFICES
BELL AND GARDNER, P.C.

EDWARD F. BELL (1929-1988)
SAMUEL C. GARDNER
LELAND PRINCE
CYNTHIA K. YOTT
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AREA CODE 313

August 7, 1989

Allen Babbitt, Esq.
BUTLER, RUBIN, NEWCOMER,
SALTARELLI and BOYD
Three First National Plaza
Suite 1505
Chicago, Illinois 60602

Re: *The City of Detroit* vs. *The County of Oakland and The County of Macomb*
Case No.: 89-79

Dear Mr. Babbitt:

Enclosed herewith please find a copy of the Petition of the City of Detroit for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, with regard to the above-captioned matter.

Thank you for your attention in this matter.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg

Enclosure

EXHIBIT C

LAW OFFICES
BELL AND GARDNER, P.C.

EDWARD F. BELL (1929-1988)
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CYNTHIA K. YOTT
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August 8, 1989

HAND-DELIVERED

Phillip G. Tannian, Esq.
PHILLIP G. TANNIAN, P.C.
243 West Congress Street
Suite 390
Detroit, Michigan 48226

Re: *The City of Detroit* v *The County of Oakland and The County of Macomb*
Case No.: 89-79

Dear Mr. Tannian:

After our telephone conversation, I double checked my Proof of Service and found that three (3) copies of our Brief *was* mailed to your current address on July 14, 1989 and not your old address as I had assumed. I cannot explain your failure to receive them. Enclosed please find a copy of my Brief. I am Federal Expressing a copy to Butler and Rubin their request.

Very truly yours,

BELL AND GARDNER, P.C.

Cynthia K. Yott

CKY/rg
Enclosure

cc: James I. Rubin, Esq. (Federal Express)